PartyLite Worldwide, Inc. and Teamsters Excavating, Grading, Asphalt, Private Scavengers, Automobile Salesroom, Garage Attendants and Linen and Laundry Drivers, Local Union No. 731, International Brotherhood of Teamsters, [1] **Petitioner.** Case 13-RC-21259

July 29, 2005

DECISION AND DIRECTION OF SECOND ELECTION

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND SCHAUMBER

The National Labor Relations Board has considered an objection to an election held November 19, 2004, and the hearing officer's report recommending disposition of it. The election was conducted pursuant to a Decision and Direction of Election issued on October 27, 2004. The tally of ballots shows 142 for and 144 against the Petitioner, with no challenged ballots.

The Board has reviewed the record in light of the exceptions and briefs, has adopted the hearing officer's findings[2] and recommendations, and finds that the election must be set aside and a new election held.

The Petitioner's Objection 1 alleges that the Employer interfered with the election by engaging in surveillance of the Petitioner's handbilling activities during the critical period. The hearing officer recommended sustaining Objection 1. Contrary to our dissenting colleague, we agree with the hearing officer. In adopting her report, we emphasize the following points.

It is well established that management officials may observe open and public union activity on or near the employer's premises, so long as such officials do not engage in behavior that is "out of the ordinary." *Arrow Automotive Industries*, 258 NLRB 860 (1981), enfd. 679 F.2d 875 (4th Cir. 1982).

Here, the hearing officer found that, on three separate occasions shortly before the election, no less than eight high-ranking managers and supervisors stood at entrances to the employee parking lot watching the Petitioner give literature to employees as they entered and exited the parking lot during shift changes. These management officials included the Vice President for Worldwide Operations, the Human Resources Director, and the Director of North American Distribution. The record shows that the Employer's conduct was "out of the ordinary." The hearing officer credited employee testimony that the presence of managers and supervisors at the entrances to the parking lot was "surprising"[3] and an "unusual occurrence."[4] Indeed, the Employer established no legitimate explanation for why any of its managers and supervisors were stationed in the parking lot during the Petitioner's handbilling activities. Instead, the Employer simply denied that its managers and supervisors were present in the parking lot while the handbilling was occurring. The hearing officer, however, discredited the Employer's witnesses based on her careful consideration of the record as a whole. As stated in footnote 2, supra, there is no basis for disturbing the hearing officer's credibility resolutions.

Our dissenting colleague claims that we have erroneously put the burden on the Employer to explain its presence in the parking lot during the Petitioner's handbilling. In fact, we have followed Board precedent requiring this Employer to explain its conduct once it has been shown the conduct was out of the ordinary.[5]

In agreeing with the hearing officer that the Employer engaged in objectionable surveillance, we also emphasize her finding that managerial personnel were stationed "close" to the handbillers. This finding is supported by the record. Specifically, testimony credited by the hearing officer establishes that managers and supervisors were not simply present in the parking lot, as alleged by the dissent, but that they were positioned at the entrance/exit to the parking lot. The handbilling necessarily took place on the public roadway immediately adjacent to the parking lot's entrance/exit. Thus, the managers and supervisors' position would put them as close to the handbilling as possible, while remaining on the Employer's property. Moreover, the record shows that they

[1] We have amended the caption to reflect the disaffiliation of the International Brotherhood of Teamsters from the AFL-CIO effective July 25, 2005.

[2] The Employer has excepted to some of the hearing officer's credibility findings. The Board's established policy is not to overrule a hearing officer's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Stretch-Tex Co.*, 118 NLRB 1359, 1361 (1957). We find no basis for reversing the findings.

[3] Testimony of employee David Carpenter.

[4] Testimony of employee Otilio Vasquez.

[5] See, e.g., *Sands Hotel & Casino*, 306 NLRB 172 (1992)(employer engaged in unlawful surveillance where activity was out of the ordinary and employer failed to introduce evidence that conduct was based on legitimate concerns), enfd. 993 F.2d 913 (D.C. Cir. 1993). Furthermore, our dissenting colleague incorrectly states that the Employer did not engage in the type of activity that the Board has previously found to be out of the ordinary. See *Arrow Automotive, supra*, 258 NLRB 860-861 (finding that the employer "took action which was quite 'out of the ordinary'" when 11 of its supervisors lined up in varying numbers at the gates where union handbilling was occurring).

were close enough to the handbilling that they could identify not only those employees who passed by the handbillers, but even which employees took a handbill from the union organizers. Accordingly, contrary to our dissenting colleague's contention, the hearing officer properly determined that the Employer's managers and supervisors stood in close physical proximity to the handbillers, and she correctly held that this factor further supports a finding of objectionable surveillance. See *Gainesville Mfg. Co*., 271 NLRB 1186, 1188 (1984)("close presence of the representatives of the [employer] during the handbilling constituted [improper] surveillance of union activities on a public road right-of-way" adjacent to the employer's property).[6]

DIRECTION OF SECOND ELECTION

A second election by secret ballot shall be held among the employees in the unit found appropriate, whenever the Regional Director deems appropriate. The Regional Director shall direct and supervise the election, subject to the Board's Rules and Regulations. Eligible to vote are those employed during the payroll period ending immediately before the date of the Notice of Second Election, including employees who did not work during the period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike that began less than 12 months before the date of the first election and who retained their employee status during the eligibility period and their replacements. *Jeld-Wen of Everett, Inc.*, 285 NLRB 118 (1987). Those in the military services may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the payroll period, striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike that began more than 12 months before the date of the first election and who have been permanently replaced. Those eligible shall vote whether they desire to be represented for collective bargaining by Teamsters Excavating, Grading, Asphalt, Private Scavengers, Automobile Salesroom, Garage Attendants and Linen and Laundry Drivers, Local Union No. 731, International Brotherhood of Teamsters.

To ensure that all eligible voters have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses that may be used to communicate with them. *Excelsior Underwear*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759 (1969). Accordingly, it is directed that an eligibility list containing the full names and addresses of all the eligible voters must be filed by the Employer with the Regional Director within 7 days from the date of the Notice of Second Election. *North Macon Health Care Facility*, 315 NLRB 359 (1994). The Regional Director shall make the list available to all parties to the election. No extension of time to file the list shall be granted by the Regional Director except in extraordinary circumstances. Failure to comply with this requirement shall be grounds for setting aside the election if proper objections are filed.

Dated, Washington, D.C. July 29, 2005

Robert J. Battista, Chairman

Wilma B. Liebman, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER SCHAUMBER, dissenting.

Introduction

At issue in this case is whether the presence of the Employer's representatives in its parking lot and their observation of union handbilling constituted objectionable conduct that would tend to interfere with employees' free choice in the election.[1] My colleagues find that such conduct was objectionable. I disagree. I find that the Union failed to show that the silent presence of certain of the Employer's managers and supervisors in the facility parking lot during Union handbilling reasonably tended to interfere with employee free choice in the Board's subsequent secret ballot election.

The Union Did Not Meet its Burden

It is well settled that "representation elections are not lightly set aside." [2] Thus, "there is a strong presumption that ballots cast under specific NLRB procedural safeguards reflect the true desires of the employees." [3] As the objecting party, the Petitioner has the burden of proving

[6] Our dissenting colleague argues that the Employer's conduct was not objectionable because it was a usual response to an unusual situation. We note, however, that this argument runs directly counter to the Employer's own assertion that "the presence of Union representatives at the facility passing out handbills between shifts was hardly anything new." Moreover, the Employer emphatically disputes that it engaged in the conduct that the dissent attempts to justify.

[1] See *Harsco Corp*., 336 NLRB 157, 158 (2001).

[2] *NLRB v. Hood Furniture Mfg. Co.*, 941 F.2d 325, 328 (5th Cir. 1991) (citing *NLRB v. Monroe Auto Equipment Co.*, 470 F.2d 1329, 1333 (5th Cir. 1972), cert. denied 412 U.S. 928 (1973)).

[3] Id.

interference with the election. That burden, which the Board has consistently described as a "heavy one,"[4] has not been met here.

The evidence shows that on three occasions during the critical period, the Petitioner handbilled employees outside the six entrances to the Employer's parking lot as the shifts were changing. On these days, supervisors and managers stood in the parking lot and at the entrances to the parking lot for approximately fifteen minutes, watching the Union give literature to employees as they entered and exited the premises.

It is well settled that where, as here, union organizers and the employees they seek to organize openly conduct their activities on or near the company's premises, they have no cause to complain that the employer has observed their activities.[5] In observing open union activity, however, an employer may not do something "out of the ordinary" to give employees the impression that it is engaging in surveillance of their protected activities.[6]

Here, the Employer's representatives did nothing more than stand in the parking lot and at the entrances to the parking lot and observe the open union activity. They did not approach employees' vehicles, take notes or pictures of the employees or handbillers, yell at the handbillers or otherwise attempt to stop the distribution of the literature. In short, the Employer did not engage in the type of activity that the Board has found to be "out of the ordinary."[7] My colleagues cite to *Arrow Automotive Industries*, 258 NLRB 860, to support their finding that the Employer's mere presence and observation was sufficiently "out of the ordinary" to constitute objectionable conduct. In that case, however, managers not only stood near the exit gates and observed the handbilling, the managers yelled at employees such things as "don't take the garbage," "bring that card to me", and "don't sign anything, you can end up in court." No such interference was present here.

The majority relies on the testimony by employees that the Employer's representatives' presence in the parking lot was "surprising" and an "unusual occurrence." There is no evidence, however, that supervisory presence in the parking lot was out of the ordinary when something unusual was taking place. Indeed, the hearing officer's report, which my colleagues adopt, refers to the handbilling as an "unusual and highly visible activity"; an "unusual occurrence." In sum, the representatives' silent observation of the handbilling under these circumstances was not shown to be "out of the ordinary".[8]

In concluding otherwise, my colleagues place the burden on the Employer to provide a "legitimate explanation" for its presence in its parking lot. Under Board law, however, as the cases I have cited above illustrate, an employer's mere observation of open union activity on or near its property does not require further justification.

My colleagues rely on the hearing officer's statement that the "close presence" of supervisors and managers in the parking lot during the handbilling constituted surveillance. The hearing officer never said what she meant by "close presence," however, and she made no finding on the proximity of the Employer's representatives to the handbilling itself. The majority, however, finds that the supervisors and managers were "as close to the handbilling as possible." There is no record evidence to support that finding. The testimony of two witnesses that the

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[4] *Kux Mfg. Co. v. NLRB*, 890 F.2d 804, 808 (6th Cir. 1989) (quoting *Harlan #4 Coal Co. v. NLRB*, 490 F.2d 117, 120 (6th Cir. 1974), cert. denied 416 U.S. 986 (1974).

[5] *Roadway Package System, Inc*., 302 NLRB 961 (1991); *Brown Transport Corp*., 294 NLRB 969, 971 (1989); *Southwire Co*., 277 NLRB 377, 378 (1985), enfd. 820 F. 2d 453 (D.C. Cir. 1987); *Porta Systems Co*., 238 NLRB 192 (1978), enfd. 625 F.2d 399 (2nd 1980).

[6] *Loudon Steel, Inc*., 340 NLRB No. 40, slip. op. at 7 (2003); *Arrow Automotive Industries*, 258 NLRB 860, 860-861 (1981), enfd. 679 F.2d 875 (4th Cir. 1982).

[7] See e.g., *Loudon Steel*, 340 NLRB No. 40, slip op. at 7 (employer engaged in "out of the ordinary" activity by walking up to and within a few feet of eight to ten employees' vehicles as the vehicles approached the union handbillers); *Sands Hotel and Casino, San Juan*, 306 NLRB 172 (1992) (posting of a security guard with binoculars to watch employees' union activities on public property near the hotel constituted more than ordinary or casual observation of pubic union activity), enfd. 993 F.2d 913 (D.C. Cir. 1993); *Kenworth Truck Company*, Inc., 327 NLRB 497, 501 (1999) (manager went beyond "unobtrusive observation of openly conducted protected activity" when he positioned himself near handbillers for an hour, repeatedly and erroneously accused them of trespassing, shouted at them, ordered them off the property, and threatened them); *Robert Orr-Sysco Food Services*, 334 NLRB 977 (2001) (employer engaged in objectionable conduct when it unjustifiably altered a security camera to purposefully videotape employees' handbilling activities); *Snap-On Tools, Inc.*, 342 NLRB No. 2 (2004) (employer violated Sec. 8(a)(1) by changing its normal practice of panning the parking lot with a surveillance camera to pointing the camera at the plant gate where employees were handbilling).

[8] My colleagues make argument. First, they claim that my analysis runs counter to the Employer's own assertions as to whether union handbilling was a usual or unusual event (see fn. 5 of their opinion.) The hearing officer, however, did not credit those assertions and I have accepted those credibility findings, as presumably have my colleagues. My analysis thus rests on the *credited* facts which I find support the conclusion that the Employer's conduct was not objectionable. Second, my colleagues say that I attempt to justify what the Employer "emphatically disputes" as having occurred. The truth of the matter is that the Employer argued in the alternative: one, that the hearing officer erred in her credibility determinations and that the conduct did not occur as she found it to have occurred; or, two, even if its representatives were in the parking lot observing the handbilling as the hearing officer found, such conduct, observing open union activity, was not objectionable. Consequently, my views are not inconsistent with those of the Employer on that point even if such consistency was of any legal moment.

managers and supervisors were positioned at the entrances on the Employer's property and the handbillers were similarly positioned outside the property does not do so. It is worth noting that this is not a small parking lot. It has six entrances and spans the length of the facility, which occupies an entire block. Furthermore, the Employer's representatives did not approach the handbillers or employees or in any manner attempt to physically interfere with the union activity.[9]

Accordingly, I find that the mere presence of certain representatives of the Employer in the Employer's parking lot and their observation of the open union handbilling taking place did not have a reasonable tendency to interfere in the Board's subsequent secret ballot election. Accordingly, I would overrule this objection and certify the results of the election.

Dated, Washington, D.C. July 29, 2005

Peter C. Schaumber, Member

NATIONAL LABOR RELATIONS BOARD

[9] Contrary to my colleagues, I do not find this case to be analogous to *Gainesville Manufacturing Co.*, 271 NLRB 1186 (1984). There, the employer interfered with the employees' receipt of union handbills by asking the union agents to leave, calling the police, and once attempting to physically impede the union's efforts by stepping between the handbillers and the exiting employee cars. Nothing of that sort happened here.